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AVOIDANCE OF TAXATION, ESTATE AND PROBATE DUTIES

by

GEOFFREY M. COHEN, F.C.A. (AUST.)
Barrister-at-Law

Over the past few years the high level of income tax, probate and estate duties has given an increasing impetus to plans by which the burden imposed by the various assessing acts can be minimised. The frequency with which these arrangements have been evolved has naturally given rise to considerable judicial comment. In England the generally prevailing view was perhaps most clearly expressed by LORD CLYDE in *Ayrshire Pullman Motor Services and D. M. Ritchie* v. *The Commissioners of Inland Revenue* (1929), 14 T.C. 754 at p. 763: "No man in this country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or to his property as to enable the inland revenue to put the largest possible shovel into his stores. The inland revenue is not slow—and quite rightly—to take every advantage which is open to it under the taxing statutes for the purpose of depleting the taxpayer's pocket. And the taxpayer is in a like manner entitled to be astute to prevent so far as he honestly can the depletion of his means by the revenue." An opposing and apparently minority view was expressed in *Latilla* v. *Commissioners of Inland Revenue*, [1943] A.C. 377 at p. 381; (1943), 25 T.C. 107 at p. 117, by VISCOUNT SIMON when he said: "There is, of course, no doubt that they are within their legal rights but that is no reason why their efforts and those of the professional gentlemen who assist them in the matter should be regarded as a commendable exercise of ingenuity or as a discharge of a duty of good citizenship. On the contrary, one result of such methods, if they succeed, is of course to increase *pro tanto* the load of tax on the shoulders of the great body of good citizens who do not desire or do not know how to adopt these manoeuvres". This view was, in Australia, in the case of *In the Estate of Wm. Vicars (Deceased)* (1944), 45 S.R. (N.S.W.) 85 at p. 93, the subject of comment by SIR FREDERICK JORDAN, Chief Justice, in these words: "No doubt those, who like Viscount Simon, regard it as a patriotic duty to pay the largest amount of tax which is lawfully exactable, would so arrange their transactions so as to attract a maximum liability . . . and those who like Lord McNaughton and Lord Atkinson, who recognize no such duty, will alter their affairs so as to incur liability for no more than is legally necessary. We are not, however, concerned with the desirability or morality of the course taken in the present case but only with its legal operation and legal consequences".

As early as 1921 it was stated in *Federal Commissioner of Taxation* v. *Purcell* (1921), 29 C.L.R. 464 at p. 472, per GAVAN DUFFY and STARKE, JJ., "The right of every man to dispose of his property, if he can, in a way which will relieve him of taxation *and for that purpose* has been recognized by the highest authority". It is submitted with respect that the views expressed by the LORD CLYDE, SIR FREDERICK JORDAN, SIR FRANK GAVAN DUFFY and SIR HAYDEN STARKE can be reasonably accepted as the correct one; certainly it is this view that is now generally held and practised (cf. observations of EVERSHED, M.R., and ROMER, L.J., in *Re Downshire Settled Estates*, [1953] Ch. 218 at p. 233; noted 28 A.L.J. 197).

Planning for tax relief

The requirements of all persons seeking to avail themselves of the various plans and arrangements generally include the following:—

1. Diminution of income tax.
2. Diminution of probate and estate duties.
3. The retention of the full and complete control.
4. The ability to regain the assets.
5. Minimum estates in the hands of the wife and children of the proposer in the event of the early death of either the wife or the children.
6. The ability to name a successor.
7. The retention of a maximum income during the lifetime of the proposer.

These wishes are not perhaps as unreasonable as they may at first sight appear. As regards the retention of control, the ability to regain the assets and the minimum estates of the children and the ability to name a successor, all of these would be within the province of the individual if he did not enter into such a plan. The assets would continue to remain his and by virtue of a change in his testamentary disposition which could not be attacked by a Testator's Family Maintenance Act application there is no reason why he could not do as he wishes with his assets. The matters of diminution of income tax and probate and estate duties are the fundamentals of the whole proposal. What the individual requires is the best of both worlds, the ability "to have his cake and eat it, too". Notwithstanding the apparent powers given to an individual by the common law and by statute, the realms of such matters are hedged in by equity, and properly so. The attempt to comply with all the requirements has frequently given rise to circumstances which frustrate the original intention by virtue of

the provisions of various Acts. The main provisions with which the individual is most likely to be confronted are as follows:—

1. *Income Tax and Social Services Contribution Assessment Act* 1936-1958 (Commonwealth), s. 102. This section relates to revocable trusts and has the effect of nullifying the reductions of income tax so that tax is assessed on the trust as though it was income of the disposer.

2. *Stamp Duties Act* 1920-1956 (N.S.W.), s. 102 (2) (j), and *Estate Duty Assessment Act* 1914-1957 (Commonwealth), s. 8 (3). These sections relate to a power of appointment which would have the effect of bringing back into the estate of the testator assets which otherwise had passed from his control.

3. *The Gift Duty Assessment Act* 1941-1953 (Commonwealth), s. 4, dealing with the definition of a "gift" and "disposition of property", which definitions are extremely wide and likely to bring within their ambit matters not within the contemplation of the individual proposing to dispose of his assets.

Corporate testamentary disposition

The tendency in Australia has gradually been towards the use of a company in some form or another for the purpose of constituting what really amounts to a corporate testamentary disposition of the estate of the individual. This mode has considerable advantages in that there can be no doubt of the complete divesting of the estate; on the other hand, however, certain disadvantages occur by way of inflexibility. Whilst the retention of voting power may prima facie appear to grant to the individual absolute control, it must be remembered that this control must be used bona fide for the benefit of all shareholders. It cannot be used as a sham merely for the advantage of the individual. He has, in fact, parted with his assets, and must deal with them for the benefit of all shareholders and cease to regard them as his own assets with respect to which he is entitled to deal as he sees fit and for his benefit solely, irrespective of the position of the other persons who now have an interest by virtue of now being shareholders of the company. The attempts to circumscribe the interest of the other shareholders being the wife and children of the individual taxpayer can only be to a limited degree successful; the power exercised by the individual, whether as governing director or howsoever provided within the framework of the company, must be exercised for the

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benefit of all and, consequently, the equitable principles must be kept in mind and not merely the matter of what the individual deems to be for the greatest advantage, but what the court would so deem.

Formation of company

It hence remains to be seen whether a plan can be evolved which will substantially fulfil all the requirements of the individual seeking protection from income tax and probate and estate duties, and yet at the same time seeking to retain in effect the control which he would have had, had those assets remained his own property. To this end the following procedure is suggested:—

1. That a company be formed, its capital to be divided as follows:—
   (a) Say 1,000 redeemable preference shares of £1 each.
   (b) A large number, preferably in the vicinity of, say, 100,000 to 250,000, 1% non-cumulative non-participating preference shares of £1 each, and
   (c) Two ordinary shares of £1 each.
2. The relevant dividend rights would be as follows:—
   (a) As regards the 1% preference shares that they should be entitled in priority to all other shares to dividend with respect thereto.
   (b) That all dividends in excess of such amount should be divided amongst the redeemable preference shares *pari passu.*
   (c) That the ordinary shares would be entitled to no dividend whatsoever.
3. Distribution in the event of winding up is set out below:—
   (a) Firstly by payment of the amount paid up with respect to the 1% preference shares.
   (b) Secondly by payment with respect to the amount paid up of the redeemable preference shares.
   (c) The excess of assets, if any, to be paid to the holders of the ordinary shares, or if no ordinary shares are allotted to be distributed to the first governing director who will be nominated in the Articles of Association.
   (d) In the event that no ordinary shares are allotted and in the event that the first governing director has died prior to winding up then the excess to be distributed *pro rata* amongst the redeemable preference shareholders.
4. Included among the Articles would be the power to distribute by way of dividend paid up shares in the capital of the company.

5. The power of the governing director would include the power to exercise 75% of all votes.
6. The successor to the governing director would be nominated in the Articles of Association and the power of that successor would be limited to the extent that in the event of winding up, the governing director entitled to receive the surplus assets would only be the first governing director named; subsequent governing directors would not be so entitled and consequently the surplus, if any, would be divided amongst the holders of the redeemable preference shareholders *pro rata.*
7. The first governing director and subsequent governing directors would naturally have complete power as regards control of the company in so far as the running and general management, the nomination of directors, the retirement and replacement of directors and all things incidental to the general control of the company.
8. The power to redeem the redeemable preference shares would be vested in the first governing director but the subsequent governing directors would not be entitled to exercise this power and the shares, upon the death of the first governing director, would effectively become preference shares not subject to redemption but still granting the same rights as regards dividend and winding up.

Procedure

The procedure to be adopted is briefly set out in the following paragraphs:—

1. On formation of the company the subscribers would take two 1% preference shares. It is unimportant who the subscribers are, subject to the fact that they must *not* include the individual disposing of his estate.
2. After formation, the individual disposing of his estate would sell to the company all his assets bona fide and for value. The company would continue to owe to the individual the amount so arising payable on demand and would grant to him, by deed, an option to subscribe for shares at par in the capital of the company.
3. By allotment to the wife and children of the individual so disposing to each ten redeemable preference shares of £1 each. If the income is sufficient to so warrant, a series of trusts could be set up such that there is no present entitlement, the trustees in each case being allotted a further ten redeemable preference shares. By virtue of the provisions of s. 99 of the Income Tax and Social Services Contribution Assessment Act the income of these trusts is not aggregated with the individual's other income.

Effect during life of disponor

At this stage the initial procedure has been completed and it now remains to look to the effect of these conditions, and also the possible effect of various changes during the life of the individual disposing of his estate by this method.

By virtue of his power as governing director, the disponor would apparently be granted extremely wide control by virtue of the 75% voting rights. Section 95 of the *Companies Act* 1936-1957 (N.S.W.) makes certain provisions which shall have effect in so far as the Articles of the company do not make other provision in that behalf. There is, however, no reason why a person who is not a member of the company should not be entitled to vote. This is a matter to be determined by the Articles of Association.

Voting

It is, hence, completely permissible to determine that any specific person should be entitled to exercise any given proportion of votes and there is no reason why that person should be a member. This is applicable for all annual general meetings of the company and consequently would grant complete control as regards the running and general policy of the company. This, however, would not be the case as regards an extraordinary or special resolution. Section 97 of the Companies Act provides that a resolution shall be an extraordinary resolution or special resolution as the case may be, when passed by the majority of not less than three-fourths of such *members* as being entitled so to do, vote in person or where proxies are allowed, by proxy. It hence follows that in order to vote at an extraordinary meeting it is necessary that the person voting be a member of the company and thus the apparent power given in the drafting is invalid as regards any extraordinary or special meeting. At the same time, the governing director would be in a position, so far as general meetings are concerned, completely to control the general policy and running of the company. It naturally follows that the governing director would not be empowered to alter the Articles of Association, to put the company into liquidation, to sell its major assets or undertakings, or in fact do anything requiring a special or extraordinary resolution. By virtue of his option to take up shares, however, the governing director would at all times be in a position to become a member of the company and hence to validate the power apparently granted to him by the Articles of Association. By virtue of the decision in the *English Electric Company of Australia* v. *Commissioner of Stamp Duties* (1924), 24 S.R. (N.S.W.) 321, it would appear that this option would not create any dutiable asset in the estate of the governing director. It was held in that case that such an agreement was not an agreement for conveyance of property and there is no property in an option.

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Change of effective distribution

Various contingencies may arise during the lifetime of the governing director, the majority of which are foreseeable; the main matters for consideration which are dealt with later herein are the event of dispute as between the governing director and his wife or children and the possibility of the wish of the governing director to change the effective distribution of his estate from that which is originally determined at the time of the formation of the company.

Dividends

Presuming in the first place the normal course of family affairs wherein the governing director does not wish to change his testamentary disposition, then annually for the purpose of avoiding taxation under Division 7 of the Income Tax and Social Services Contributions Assessment Act, dividends would be declared. The *quantum* of these dividends would be determined by the relevant division of that Act. The form of dividend, however, would be determined by the governing director; to this end it is suggested that the shareholders be given credit for a sufficient amount in order to cover payment of the income tax with respect to which the shareholder will become liable. As regards the remainder of the dividend, however, the power contained in the Articles allowing for the distribution of paid up shares in the capital of the company should be invoked and the shareholders allotted 1% non-cumulative preference shares with respect thereto. The effect of this would be that the shareholders would not become creditors of the company, and, in the event that dispute arose at some future time, would not be empowered to make demand upon the company for payment of large sums with which they may have been credited. In effect, they would become larger and larger shareholders, but this would not grant any entitlement to demand beyond the matter of the preferential dividend which would be paid to them each year subject to the earning of sufficient profits in order so to do.

Birth of children

In the event of birth of any further children the governing director could use his option to the extent of requiring the allotment to him of ten further redeemable preference shares, which shares he would then immediately transfer to the new-born child. This procedure is recommended rather than the immediate allotment to the child; Equity jealously guards the rights of shareholders and the allotment of ten shares to some new shareholder, whilst beneficial to that shareholder, may well not be for the benefit of the company as a whole (see, e.g., *Reichenbach* v. *Associated Newspapers Ltd.* (1953), 27 A.L.J. 536).

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Equitable distribution

It hence follows that it would be unwise to make the allotment directly to the child and safer to pay such gift duty as may be necessary on the transfer, the allotment being made pursuant to a pre-existing right arising under the option and not pursuant to the whim of the governing director. By this method an equitable distribution within the family can be continuously retained whilst not transcending the bounds of equity as set down by many decisions in the past years. In the event of the death of the wife or a child during the lifetime of the governing director, their estates are consequently limited as follows:—

(a) As to the redeemable preference shares and the 1% non-cumulative preference shares the value is limited to £1 per share. As regards redeemable preference shares this is the amount for which they can be redeemed and even if the company were to be wound up, this would still be the amount payable both for these shares and for the non-cumulative preference shares and consequently the application of s. 16 (a) of the Estate Duty Assessment Act would not cause any variation in the value.

(b) The amount standing to their credit in the books of the company would be limited to the amount of taxation to be paid for the following year and would consequently be a minimal amount.

Life estate of wife and children

It hence follows that the total estate of the wife or children of the governing director would be limited to the amount of dividend which had been declared to them during the period from commencement of this scheme to date of death, less any amount which had been paid by way of taxation or had been paid to them by way of cash in lieu of gifts during that period. This represents a minimum estate and would not be burdened by any increase in capital value by virtue of undeclared dividends lying in reserves of the company or any accretion to capital arising by virtue of increase in value of capital assets of the company. In the event of dispute arising, the governing director has several courses open to him. In extreme cases he could cause the redeemable preference shares of the child in question or of the wife to be redeemed consequently granting no future dividend entitlement excepting only as regards the amounts payable on the 1% non-cumulative preference shares. The effect of this would be that he is not in any way compelled to buy out the interest of the member of the family with whom dispute has arisen; the only burden placed amounts to a borrowing of money at 1% interest rate. Naturally it would always be open to the governing

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director to purchase the interests of the member of the family with whom dispute has arisen, but, as mentioned before, this is in no way mandatory and the amount of liability can be limited to a very minimal figure. Even presuming in the intervening period that dividends declared exceeded income tax and other cash payments by some £30,000, the annual liability would amount to only £300 p.a. A further effect of the redemption of the shares would be that there would be no further accumulation and, consequently, the total interest of the child with whom dispute has arisen in the estate of the governing director would be limited to that amount of non-cumulative preference shares held by the child at the time of dispute.

Power of appointment

It is naturally desirable that so far as possible, the governing director should not exercise his right to take up shares and to retain those shares. As mentioned before, in the event of the birth of a further child the option would be exercised and the shares transferred to the child, but those shares would not remain within the hands of the governing director. If the shares do remain within the hands of the governing director, the 75 per cent. voting right is completely validated since he is immediately a member of the company. Whilst it is always difficult, if not impossible, to foreshadow any changes in legislation, it is reasonable to assume that an extension of the power of appointment clause could well bring within its ambit such a power. If, however, the power is an invalid one, then it follows there is nothing which may be valued and, consequently, it is desirable that this option should not be exercised unless it is necessary to change the whole character of the company within the lifetime of the governing director. In fact, this should not be necessary by reason of the fact that it is possible for the governing director to redeem the redeemable preference shares and at such point of time continue to carry on the company effectively for his own benefit subject only to the burden of the preference dividends payable with regard to the 1 per cent. non-cumulative preference shares.

Power vested in disposer

The power vested in the disposer by the above proposals is briefly summarized as follows:—

1. The complete and absolute control of the general policy and management of the company.
2. The right to redeem the preference shares and consequently to obtain for himself the benefit of all profits other than the amount payable with regard to dividends for the non-cumulative preference shares.

3. The right to validate his power by exercise of the option and the consequential liquidation of the company, such that the assets of the company fall back to his own hands, excepting the amount already created by virtue of the non-cumulative preference shares.

4. The right to change the proportions of distributions to his wife and children by virtue of either of the following methods:—

   (a) By the redemption of one or more preference shares, or

   (b) By the exercise of the option for the subscription for one or more redeemable preference shares, and the transfer thereof to one or more members of his family.

It follows that the governing director is in a position not only to control and manage the company, but also in a position to decide at any subsequent date upon the form and proportion of distribution of his estate. It should be noted that his estate has been effectively "pegged" at the time of the formation of the company and presuming that the balance of his loan account has been more or less liquidated by the date of his death, then there is no estate which may be attacked by a Testator's Family Maintenance Act application and, consequently, the distribution chosen by the governing director and existing at the date of his death and represented by the redeemable preference shares and non-cumulative preference shares in the capital of the company is one which cannot be assailed under present legislation.

Successors to governing director

As mentioned, successors to the governing director will be nominated in the Articles of Association. These successors, presumably, will be nominated for a specified period of time until, for example, the children come of age or attain the age of 25 years. This date would be determined by the governing director at the time of formation of the company. Within the powers, however, of the governing director would be the ability to substitute another person from time to time for the one specified in the Articles of Association with a provision that any name so substituted by the governing director by ordinary resolution would be deemed to be the name originally specified in the Articles of Association. This would, in effect, create the result of a special resolution without the necessary requirement as regards voting within the terms of s. 97 of the Companies Act.

Winding up

One problem remains with relation to the winding up of the company. Presuming that the governing director has decided that he desires to obtain for his own benefit all assets, there are various courses open to him. Firstly he could redeem the redeemable preference shares and cause to be allotted to himself one ordinary share such that on liquidation all excess above the remaining preference capital would flow to that ordinary share and consequently to the governing director. A distribution on liquidation would call into play s. 47 of the Income Tax and Social Services Contribution Assessment Act, which section provides that distributions to a shareholder to the extent to which they represent income derived by the company shall be deemed to be dividends paid to the shareholders by the company out of profits derived by it. At the time of winding up, the assets of the company would no doubt have been increased by virtue of income earned and not distributed to shareholders per medium of the retention reserve within the terms of s. 103 of the Income Tax and Social Services Contribution Assessment Act. There is no doubt that the position would become increasingly complicated with the passage of time and could give rise to a very substantial tax liability on winding up. If, however, the company were wound up by mutual consent of the other shareholders the position would remain equally complicated, in that the governing director would not be a shareholder but would still obtain the benefit of the assets of the company by virtue of the winding up. Such a distribution would not fall within the terms of s. 47 of the Income Tax and Social Services Contribution Assessment Act. It would, however, be necessary to consider whether such moneys would fall within the general term of income under the Income Tax and Social Services Contribution Assessment Act and particularly ss. 25 and 26 thereof, and also that this distribution could not be attacked by s. 260 of that Act. It would no doubt appear wiser that in the event of the governing director deciding to regain the control and benefit of the assets, the company should be continued and that the governing director should become a shareholder by virtue of taking up one redeemable preference share pursuant to his option and redeeming all other such shares. If he were to adopt this latter scheme, the proposals would still remain fluid for any future alteration of the plan.

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OPTIONS TO PURCHASE*

The powers of an owner of property, who has granted an option to purchase his land, of dealing with such property in the period between the grant of the option and its exercise may be said never to have been fully considered by the Courts. In the case of an option exercisable within a short period, and at a fixed price, the position was considered in *Re Crosby's Contract*, [1949] 1 All E.R. 830. But how far the principles there enunciated are applicable to an option for a long period, or at a price to be determined when the option is exercised, appear never to have been decided. The principle of *Re Crosby's Contract* (*supra*) would apply (subject to the above) to all options, and also to a right of pre-emption, or "first refusal" by the vendor if the purchaser desires to re-sell the purchased property, as in *Manchester Ship Canal Co.* v. *Manchester Race Course Co.*, [1901] 2 Ch. 37. Such right is merely a personal one and does not bind assigns of the land.

In *Re Crosby's Contract* (*supra*) the option was contained in a lease for twenty-one years and was exercisable within seven years of the commencement of the term. It provided that the landlord should on three months' notice, and on payment of £2,000, together with all arrears of rent, and interest on the £2,000 from the expiration of the notice until payment, convey to the tenant in fee simple the whole of the premises of which the demised premises formed part. The tenant was to accept without objection the title of the landlord, but should have delivered to him at his own expense such abstract of title as he should require, and the landlord should be able to furnish. The lease comprised the ground floor of the premises, which was used as a shop, and the landlord herself occupied the upper part. The tenant gave a notice to exercise the option which was ineffectual. The landlord then granted a lease to her husband of the upper part for twenty-one years. The tenant gave a further effective notice to exercise the option, but on learning of the lease, objected to the title. The landlord issued a summons for a declaration that the tenant was bound to accept a conveyance subject to the lease, and that he was not entitled to vacant possession.

ROMER, J. (as he then was), referred to *Williams on Vendor and Purchaser* (4th edn.), Vol. I, p. 201, and to *Cook* v. *Taylor*, [1942] 2 All E.R. 85, and said that it was reasonably plain that if the option had stopped short of the final passage relating to the acceptance of the landlord's title, the implication would be that the conveyance which the landlord was to give would be a conveyance of the

* By courtesy of *The Law Journal*, England.

property with vacant possession, because at the date of the lease granting the option the landlord was in occupation of the upper floor. It was, however, argued on behalf of the landlord that there was no room for this implication, because by the concluding part of the option the tenant bound himself to accept without objection the title of the landlord, and so contracted to purchase the property in the state in which he found it at the time he exercised the option. It was also submitted that the tenant was not bound to exercise the option if the landlord did something which reduced its value; but if he did exercise it, he was bound to take the property as he found it. It was argued on behalf of the tenant that the landlord was not entitled to introduce a defect in title after the grant of the lease, and that the clause was merely one restrictive of the tenant's right to requisition on title. The landlord's right to deal with the property would not be sterilised for seven years, as she could find a weekly or monthly tenant. It was also suggested that an option of this kind was something more than a mere offer, that it created some interest in the land, as it could be registered as an estate contract, and that after the grant of the option the landlords were in a sense trustees for the donee of the subject-matter of the option.

In his judgment, said the learned Judge, the view put forward by the tenant was the right one. The concluding part of the option was directed to the landlord's title as at the date when the lease was granted, the tenant was bound to accept that freehold title which was then vested in the landlord, and it was not intended to enable the landlord to introduce at any subsequent time a defect which did not exist when the lease was granted. This would be to attribute to this more or less common form an effect which it did not fairly bear. It was true that some forms required the tenant to accept the title *up to the date of the lease,* but the language in the present clause had the same effect.

The tenant was bound to accept the title as it was when the lease was granted and would not have been able to object to a lease which then subsisted.

If the landlord were right, the landlord could mortgage the property, and require the tenant to purchase it subject to the mortgage. If a lease were granted, questions of difficulty would arise whether the rent was a fair or an unfair one. Consequently the lease of the upper part of the premises was not binding on the tenant, and the landlord did not make a good title so long as it remained on foot.

Thus, whether or not the tenant is expressly required to accept the title *at the date of the lease,* he is entitled (when the option includes any property not comprised in the lease) to have such property with vacant possession,

and also, free from incumbrances of any kind created subsequently. As regards defects in title existing at the date of the lease, the judgment in the above case is also authority for the view that, where the tenant is required to accept the landlord's title (whether or not the words up to the date of the lease are added), he cannot complain of an existing defect in title. It was held in *Fowler* v. *Willis,* [1922] 2 Ch. 514, that where the lessee had the option to purchase "all the estate, interest and title which is at the date of these presents vested in the landlords" for £3,000, and the reversion was subject at the date of the lease to a mortgage for £500, the tenant must take the property subject to the mortgage.

But this decision has been doubted, on the ground that where a purchaser agrees to take what title the vendor has, such title must be free from incumbrances.

But even where no stipulation as to acceptance of the title is made, it seems clear on general principles that the grantee of any option to purchase at a fixed price is entitled to the property not only with vacant possession but also free from incumbrances, whether existing at the date of the option, or created subsequently thereto. An agreement to sell land means prima facie an agreement to sell it free from incumbrances, unless the purchaser knows that the property is subject to an irrevocable incumbrance, such as a lease (*Timmins* v. *Moreland Street Property Co., Ltd.,* [1957] 3 All E.R. 265).

As regards incumbrances, this is of course clear where the option provides that the property is to be sold free from incumbrances, or subject only to certain specified incumbrances, though there is some doubt whether a beneficial lease is an incumbrance—see, however, *District Bank, Ltd.* v. *Webb,* [1958] 1 All E.R. 126.

If, however, the option is not to purchase at a fixed price, but at a price to be agreed, or determined by arbitration, at the date of purchase, the position as to leases or incumbrances created subsequently to the grant of the option may be different. In this case the price will be calculated having regard to the leases or incumbrances then existing. Further, in an option exercisable at a remote date, it could hardly be inferred that the donor's ordinary rights as owner of dealing with the property are to be abrogated without special provision being made to exclude or limit them. Options are legally limited in duration only by the perpetuity period, which may in some cases extend to 100 years. But the grantor must act fairly, and he could not, it is submitted, grant a lease at a premium, which he would receive for his own benefit, or probably a long lease. In *Re Crosby's Contract* (*supra*) the option was exercisable only within seven years and was at a fixed price.

It is, however, always desirable expressly to clarify the grantor's right to deal with the property, when it is desired that he should have such right. When it is not so desired, the standard precedents of options should be employed. They are drafted with the rights of the parties in mind, and any departure from them should not be made without careful consideration. *Re Crosby's Contract* (*supra*) shows the possible danger of so doing.

The argument in the above case that the grantor was in the position of a quasi-trustee of the property for the grantee is not, it is submitted, well-founded, if it goes the length of imposing on the grantor the full liabilities of an ordinary vendor of land. No contract for sale is concluded until the option is exercised; until then the grantee has (at any rate for the present purpose) only the right to enter into such a contract (*Wright* v. *Morgan*, [1926] A.C. 788 at p. 796; *cf. Re Mulholland's Will Trusts*, [1949] 1 All E.R. 460).

In *Raffety* v. *Schofield*, [1897] 1 Ch. 937, the grantor was held to be liable as trustee of the property, but in this case the option had been exercised. A vendor of land must manage the property in like manner as a trustee, and must do repairs necessary to preserve it up to the date for completion. But he is not bound to rebuild it if it is destroyed by fire, or to insure it; and this would apply *a fortiori* to the grantor of an option. Nor would such a grantor appear to be liable for altering the property in any way which improves its value, or for non-repairs, at any rate if the option is not to purchase at a fixed price. But the grantor of any option would be liable for doing anything which would obviously depreciate the value of the property.

CASE NOTES

Bill of Sale

Building contract in common form — materials paid for under architect's certificate—claim by liquidator—whether contract a bill of sale within Bills of Sale Act 1899 (Western Australia).—The appellants entered into a building agreement in common form with respondent company whereby the company undertook to build a residence and the agreement included the usual provision for progress payments. A certificate was issued by the architect and the amount certified was duly paid thereon. The respondent company went into a creditors' voluntary liquidation and the liquidator made a claim for certain materials delivered on the site and for which the appellants had paid on the architect's certificate. On appeal from a judgment on an interpleader issue that the provisions of s. 25 of the *Bills of Sale Act* 1899 applied in that the building contract was a bill of sale, it was held that the contract was not a document by way of sale nor was it a document affecting a bailment and that the contract was not within the definition of "Bill of Sale" in the Act and the appeal was allowed (*Davidson* v. *Claffey Constructions Pty. Ltd.* (1958), 60 W.A.L.R. 29).

Charities

Gift to the Presbyterians, descendants of those settled in the colony hailing from or born in the north of Ireland—public benefit—benefit to community or a section of the community.—A codicil made in 1895 to the will of a testator who died in 1897 provided: "I give and devise Block 70B —— to the Presbyterians, the descendants of those settled in the colony hailing from or born in the north of Ireland to be held in trust for the purpose of establishing a college for education and tuition of their youth in the standards of the Westminster Divines as taught in the Holy Scriptures". It was agreed that this gift was invalid if it was not charitable. It was held that the gift was not charitable because it lacked the necessary element of public benefit, as the beneficiaries were not the community or a section of the community, the nexus between them being simply their personal relationship to several propositi, i.e., certain persons living at the date of the testator's death (*Verge* v. *Somerville,* [1924] A.C. 496, and *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.,* [1951] 1 All E.R. 31 applied; *Re Tree,* [1945] 2 All E.R. 65 distinguished) (*Davies* v. *Perpetual Trustee Co. Ltd.,* [1959] 2 All E.R. 128 (P.C.)).

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[Opinions expressed by the writers of contributed articles are not necessarily those of this Journal.]

All communications should be addressed to:

EDITORIAL DEPARTMENT
BUTTERWORTH & CO. (Australia) LTD.
6-8 O'Connell Street, Sydney.

W. E. Smith Limited, Webb and Boundary Streets, Croydon, N.S.W.